Louisville Chancery Court, Kentucky, July, 1853.

EX PARTE ALEXANDER.

1. The refusal of a writ of *habeas corpus* by one Court, is no bar to an application to another Court.
2. A Court can, on *habeas corpus*, deliver a party from imprisonment for a contempt of Court, where the Court committing the party has transcended its authority by excess of punishment, or by a punishment unknown to the law. But the question of contempt, if the Court had authority over it, will not be inquired into on *habeas corpus;* nor will a writ of error lie in such case; for every Court must be sole judge of the contempts against itself.
3. Cases of contempt were not cases for juries at common law, or under the Constitution; and the statute does not now require a jury to find the imprisonment beyond a day, where an order of the Court has been violated.
4. When we adopted the common law in this country, we did not adopt all the power exercised under it; but American principles regulate the power.
5. A commitment for contempt "*until the further order of the Court,*" is void.
6. The power to punish contempts is a power only of necessity—what ought to be done where a party cannot strictly comply with an order of Court.

The opinion of the Court was delivered by

PIRTLE, CHANCELLOR—James C. Alexander petitions this Court for a writ of *habeas corpus*, to be discharged from the jail of Jefferson county, to which he was committed by the order of the Jefferson Circuit Court. The record of the Circuit Court is referred to, and it is agreed that the Court shall grant, or refuse the writ, as the commitment shall be deemed valid, or invalid; and so the case has been heard on its merits, without waiting for a return of the jailor to a writ.

The Circuit Court made a decree for the sale of infants' real estate, and appointed Alexander a commissioner to make the sale, and ordered the "notes for the purchase money to be returned to Court subject to the order of Court." Alexander made the sale, and, instead of returning the notes to the Court, he collected the money on one of them, amounting to $711, and delivered the note to the purchaser. This fact appearing in his report, made in response to a rule against him, the Court ordered an attachment for a contempt "in failing to pay into Court" the sum of money.

When brought in on the attachment, he stated on oath that he was the administrator of one Cochran; that he was appointed the Commissioner to sell the lot of land belonging to the estate; and he was advised he had blended the duties of the two offices, and had been advised that it was his duty to collect the notes, which he had taken as commissioner; that he was not able to pay the money, and that he meant no contempt to the Court. The Court ordered him to be committed to the jail, "until the further order of the Court for a contempt offered in violating the decree of sale." This was on the 13th of June. It seems another order was made on the 16th of June, which I do not see in the transcript of the record. On the 22d of June, an order reads; "James C. Alexander, the Commissioner in this case having failed to pay into Court on this day, as he was required to do by an order of this Court, made herein on the 16th of June, the amount of money by him collected, in disobedience to, and in violation of the order of the Court in this case, and he appearing in Court, and failing and refusing to pay said amount, and he having violated the orders made heretofore herein, it is ordered that he be recommitted to jail until the further order of the Court, for the contempt offered by him in disobeying and violating said orders of this Court; and it is further ordered and decreed, that he pay the amount by him collected of Israel Hyman, the purchaser, into Court, for the use and benefit of said Hyman." In the same order, Hyman having insisted on his purchase, and declining to say whether he was willing to pay again the $711, the Court refused to confirm the sale, and ordered the property to be resold.

Afterwards, Alexander moved to be discharged from prison; among other things, "because it was impossible for him to return the note into Court, it being in possession of Hyman, the purchaser, and because the Court had no power to make the order requiring him to pay the money into Court for the use and benefit of said Hyman;" and he filed several affidavits showing his inability to raise money. The Court overruled his motion.

It appearing to the Court, on the suggestion of Hyman's counsel, on the same day, (23d June,) that Alexander was at large, an

attachment was ordered against him; and on the next day, when he was brought in, the Court considering that he had been illegally discharged, again ordered "that he stand committed for such contempt, until the further order of the Court." It seems he had been discharged by two justices of the peace, supposing they had power to do so, under the law, for the benefit of insolvent debtors.

On the 28th of June, Alexander's counsel presented his petition to the Circuit Court, praying a writ of *habeas corpus*, setting forth, substantially, the same complaint of illegal imprisonment which is contained in the petition to this Court. The Court refused the writ.

1. The refusal of that Court to grant the writ of *habeas corpus* is no bar to an application here. Even if the writ had been granted, and the case fully heard upon the return made to it, and a formal order made of record, refusing a discharge from imprisonment, the writ now applied for might be granted by this Court. Proceedings *refusing* the benefit of a *habeas corpus* will always be considered with deference and respect, when application is made to another tribunal; but they are not final—they do not stand as judgments, and do not bar, any more than the refusal of a *supersedeas* or an order for an injunction out of Court.

2. Can the *habeas corpus* be granted where the party is imprisoned for a contempt, by a Court having power to punish contempts?

This writ was the privilege of every Englishman at the common law, when he was imprisoned contrary to the law of the land. It was a privilege belonging to him, derived from his Saxon ancestors, which was not to be withheld in any instance, unless he was detained by a lawful power, lawfully exerted. His privilege was wide as that of a citizen of Rome, except that he had to apply in his own name, whereas every Roman citizen could apply to the prætor for himself, or any other Roman, for an Interdict, having substantially the effect of the *habeas corpus* of the common law.

The statutes of 16 Charles 1st and 31 Charles 2d, regulating proceedings on *habeas corpus*, are more in detail than our statute; and while they were intended to preserve the common law privilege, they made exceptions to the granting of the writ in some cases,

which have operated, in the opinion of some Courts, as restrictions on the privilege. But these are restrictions to the action of the judge who grants the writ in vacation. He has not the power to release "*persons convict*," or to discharge a person brought before him, if it appears that he is detained "*upon any legal process out of a Court having jurisdiction of criminal matters.*" This was the constant practice before the statute, even if a judge in vacation could issue the writ before the passage of the *Habeas Corpus* Act, 4 Johns, Rep. 358. But where *the Court* awarded the writ, the authority, and the whole of the authority, by which the party was detained, was examined. I do not mean the regularity or the clearness from error in its exercise, but the validity, the *lawfulness* of the authority.

I do not know an instance where the Courts of England, in modern times, have declined to look into the authority by which a man has been imprisoned. They have, (and always will do so, I have no doubt,) declined to examine the merits of the judgment on this writ; but where the judgment does not belong to the tribunal to give, they have not failed to say so. In the great and leading case of the *Lord Mayor of London*, 3 Wils. Rep. 198, Ch. Justice De Grey says, "The writ by which the Lord Mayor is now brought before us, is a *habeas corpus* at common law." "This is a writ by which the subject has the right to the remedy of being discharged out of custody, if he hath been committed, and is detained contrary to law; therefore the Court must consider, whether the authority committing is a legal authority; if the commitment is made by those who have authority to commit, this Court cannot discharge or bail the party committed." The Court in this case, looked upon the House of Commons as a Court having power to punish contempts; and because the Court of Common Pleas did not know, judicially, what was the law of contempts in that House, or what its punishment was—it decided that it was bound to remand the prisoner to the Tower. At page 200, *De Grey* says, "We do not know, certainly, the jurisdiction of the House of Commons; we cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges; we cannot judge

of the contempts thereof—we cannot judge of the punishment therefore." And at page 205, Mr. Justice *Blackstone* says, "it is our duty to presume the orders of *that* House and their execution, are according to law." Now, certainly, these expressions imply that if the Court could form a judgment with regard to the punishment inflicted by that Court, (the House of Commons,) and was not left to presume the orders of that Court and their execution were according to law, the Common Pleas would, if it had found the House had exceeded its authority, have discharged the Lord Mayor. Power is not to be considered lawful authority, barely because it is exercised by a Court. It *may* not be lawful. It is sometimes erroneously exercised, scarcely ever beyond the point of lawfulness; but it is possible to be so, even in the highest tribunals.

The *Habeas Corpus* Act in this State, as far as the cases to which the writ is applicable are concerned, is a mere re-enactment of the common law. After having stated what officers shall grant the writ, the 3d section provides—"The writ of *habeas corpus* shall be granted forthwith by any of the officers enumerated in the first section of this article, to any person who shall apply for the same by petition, showing by affidavit or other evidence, probable cause to believe he is detained *without lawful authority*." The law standing so, this Court is bound to inquire into the lawfulness of the commitment, although it is a commitment by a high court, and for a contempt to that Court. This is a case in court, not in vacation, (if there could be any difference under our statute,) and this Court is bound to proceed as at common law.

The power to punish contempts is necessary to the administration of justice. It belongs to courts for the purpose of upholding the authority, respect and dignity, not of the judge, but of the law. Without this power, the law itself must, many times, fall in weakness, its solemn injunctions be the sound of mockery; and with the Courts, justice must sink into contempt. This power must, from the very nature of the cases that call for its exercise, be much left to discretion; sometimes as to when it shall be used; and sometimes as to the manner in which it shall be exerted. It is impossible for legislation to foresee and provide for all instances. To attempt to

do so, would lead to embarrassment and confusion, and it would often be to leave the redress of wrongs not to be found in the law. The power may be abused—so may other necessary power; but that has never been a sufficient reason for taking away power, or for not trusting it in any instance. We have, from the nature of society, to intrust men. No civil institutions are perfect, because they are made by men, and must be carried on by men who are fallible. This it is fruitless to regret or complain of, for it cannot find remedy. The dispatch, promptitude and command with which some of the action of Courts of Justice must be conducted, require some things to be left to the judge, looking to the responsibility of his own conscience as an elevated man; to the public sentiment as to hardness and cruelty, and to the law—for all are responsible to the law. This doctrine of the necessary power over contempts has existed ever since the law had any history. It would be useless to quote books to show that the experience of society proves what I say. To support this necessary power in a proper manner, the revised statutes, page 215, say, "That no writ of error, or appeal, shall lie 'from an order or judgment of any Court punishing a contempt.'" This was the common law. It has had the sanction of ages. In the case of *Johnson* vs. *Commonwealth*, 1 Bibb, 602, the Court of Appeals, says, "The great purposes for which Courts are instrusted with the power of punishing contempts, demands a speedy and summary proceeding, not consisting with delays consequent upon writs of error or appeals." After a few sentences, the Court goes on to express these important truths. "In fact, the rights, liberties and property of the whole community are immediately involved and interested in the support of the constituted authorities. What are laws without the means competent to enforce and secure a due obedience? To this end, a power in courts of justice to suppress contempts and disobedience to their authority, by immediate punishment, is essentially necessary, and results from the very first principles of judicial establishments. Laws are necessary to the good order of society; Courts are ordained by the laws, as necessary for their due administration; hence due respect for the courts is as essentially necessary as a regard for the laws themselves: for

when once such respect is lost among the people, the authority of the Court is at an end." The Court proceeds to say, "One Court cannot judge of a contempt committed against another. In fine it seems necessary to the very existence of a court in the healthy exercise of its powers, that it should have exclusive jurisdiction to judge of contempts to its authority,"

"But it may, perhaps, be asked, if each Court is suffered to exercise the power of punishing contempts, where is the security of the citizen against the arbitary oppression of the judge, by a wilful infraction of the law. It is answered that the citizen finds security in his own correct demeanor, in the great lenity and unwillingness which has generally been remarked in courts, to resort to this exercise of their powers, but above all, in that responsibility which the judge owes to the assembled representation of the country, for any corrupt or wilful and arbitary abuse of his powers."

"Government cannot be administered without committing powers in trust and confidence."

There are countless other powers than that in regard to contempts, of great importance, daily exercised, and which *must* be exercised in the sound judgment of the Court. And yet, in the nature of things much wrong, and in some instances, much oppression *might* be done. What could be more oppressive than to refuse bail where it should be granted? or worse than to demand excessive bail, so that it operates with the same hardship? yet these must be left, and have always been left in the discretion of the judge.

This Court cannot deliver any person lawfully committed by the Circuit Court for contempt. It cannot, on *habeas corpus*, inquire into the question of contempt. But if there should be a commitment in an instance where there *could* be no contempt, as where a Court should adjudge a man guilty of contempt, who was not, in any sense, before the Court, as, for instance, (and the supposition is very remote,) where a man should be ordered to pay a debt, who was not an officer of the Court, in any sense, and against whom there was no suit or proceeding, and he should be imprisoned for disobedience of the order, the proceeding then would be *coram non judice*, and the order merely void. So if the Court has jurisdiction

regularly, and in the commitment exceeds the power of the law; as if a man should be committed for life for disobedience of a lawful order; or should be committed to the pillory instead of the jail, then he should be released by *habeas corpus*. These are very extravagant instances, but they serve to illustrate.

The doctrine that one Court cannot relieve against the lawful commitment of another Court, is clearly stated in many cases; but I need not cite more than the case of the Lord Mayor before referred to, and the case of *J. V. N. Yates*, 4 Johns. Rep. 315. I know this case was reversed by the Senate of New York, but I have no sufficient evidence that it was on this point; and if it were, I should regard the opinions of Kent and Thompson, and Van Ness, more than the vote of the Senate. The learned Counsel for the petitioner, in his able argument, seemed to think that Ch. J. Kent had approved a decision of the King's Bench, in the time of Charles 1st, which refused to discharge a prisoner lawlessly committed by the Star Chamber. But this is a mistake. *Chambers' Case*, Cro. Car. 168, quoted by Kent, was a case of contempt in open Court by insulting language; and the King's Bench barely decided that it could not deliver a man from a lawful commitment; for although the Star Chamber had much odious and tyrannical power given it in time of Henry 7th, and Henry 8th, yet it was one of the ancient Courts of the realm, and had a portion of legitimate power; and that exercised was of such character. The severity of the punishment, however, in that case, would now be deemed beyond the power of any Court for such an offence.

3. Had the Court jurisdiction to commit in the case? I think it had. The failure to return the note, and the receiving and using the money, were a high contempt of the authority of the law, calculated to degrade the administration of justice, to destroy confidence in the Courts of Kentucky, and they actually did defeat justice in its own course. Such instances call for the immediate action of the Court.

But it is contended that, as the note had been put out of the power of Alexander, the imprisonment could not produce it, and thus the order taken could not operate a remedy for the infants,

but was merely punitory, and must come within the 1st section of Article 24, of the Revised Statutes, which, in general language, does not allow imprisonment for contempt exceeding one day without the intervention of a jury, page 273. And it is also contended that if this section applies, then the commitment, being void for this, should be deemed void as to the money too; and the party should be discharged. I do not see the force of the last position. Why should it be void *in toto*, because the party is committed for two things, "until further order?" If he should have been committed for one thing, he ought not to be let out, because he ought not to have been committed for another. If a man were committed on a charge of felony, until, &c., and also for something out of the power of the law, he should not be discharged of the commitment for that which demanded his imprisonment.

There is some difference in the language of the 10th section of the Article just referred to, and the 3rd section of the Act of 1793; but I think the same construction should be given to the new law, which was given to the old. After making the same provision in substance, about calling a jury, the act of 1793 says: "This act is not intended nor shall be construed to affect cases where a party served with process from any Court, judge or justice, shall refuse to answer according to law, or to perform any decree, judgment or order of the same." Until this law was passed, requiring a jury in certain cases, there was no certain fixed time, beyond which a man might not be imprisoned for any contempt of Court, without calling a jury; contempts were not jury cases at common law, or under the constitution; and when the legislature restricted the power of the Court without a jury, to one day's imprisonment by the 1st section of the act of 1793, it was careful in the 3rd section to leave the power of the Court in such cases as this of Alexander's, to the common law. And such was the universal judgment of the Courts of Kentucky. Whether the Court punished the contempt done in violating its lawful order or decree, for the purpose of vindicating the law and its authority in the administration of justice; or whether the punishment was to operate also as a remedy for a party litigant, there was no difference at common law, and none

after the passage of that statute. But surely where the Court is called on to imprison a man merely to vindicate the law and its authority in the Courts, and the process of its Courts, it should be, as our Courts have always been, very careful not to inflict any punishment not imperiously demanded by this important object. Any thing of hardness or cruelty would defeat the purpose aimed at, and bring the Court into odium. If a jury were called in cases provided for by the statute, and excessive fine or imprisonment were found, such as the Court did not approve, it would be the duty of the judge to inflict less than the verdict called for; and he would not be so far bound by the verdict as in a case of an indictment for a misdemeanor.

The 10th section of the article quoted, says: that "nothing in this article shall be construed to prevent any Court or judge thereof from proceeding against any person writing or publishing a libel, or slanderous words, of and concerning such Court or judge in relation to his judicial conduct in Court, by indictment or presentment, nor from prohibiting any Court or judicial tribunal from punishing any person guilty of a contempt in resisting or disobeying any judicial order or process issued by, or under the authority of such Court or judicial tribunal or officer." This is a section not very carefully written. But we cannot suppose it was intended that a grand jury should be called; or that there should be a punishment for the violation of the order of the Court, only by the verdict of a jury; for there is not one word in the article that could have been construed to prevent the punishment for violating an order, &c., if a jury was called. It must then have been intended, as was the 3rd section of the act of 1793, to reserve the power of the Court, without the verdict of a jury to vindicate the orders, &c., of the Court. Any other construction would require the Court to have the verdict of a jury every time an injunction should be violated, or an order disregarded to file books, deeds or other papers, or to pay money into Court by a receiver of the Court, or other officer, or even to file an answer. Such a course would stop the wheels of justice, and render the necessary orders of the Court merely nugatory. A great portion of the jurisdiction of this Court, so necessary

on these matters, in favor of boatmen in enforcing quick payment of their wages, would be practically lost.

The Court of Appeals in the case of *Bickley* vs. *The Commonwealth*, 2 J. J. Marsh, 572, decided, that although according to the case of *Johnston* vs. *The Commonwealth*, (which was approved) that Court had not jurisdiction to re-try the contempt, yet it had power on a writ of error to reverse so much of an order as exceeded the power of the Court below. In the case of *Patton* vs. *The Commonwealth*, at the present term, that Court had before it an order committing the plaintiff until certain sums of money were paid; yet, although the Court took jurisdiction as to the sums of money, they being too large, it said nothing of the excess of power without a jury, which could not have been disregarded if the 1st section aforesaid, applied to such cases; for then there would have been an excess of power, and the Court of Appeals had jurisdiction to correct the order, as decided in the case of *Bickley*.

4. But it is contended that the money was not collected by Alexander as a commissioner of the Court; that the Court set aside the sale because it could not be received by him; and having set aside the sale, the Court had no more jurisdiction as to the money; and Hyman must have his remedy by suitable action, as in other cases of indebtment. It does not seem to me so. He received the money on the note, which as commissioner he had taken, and which had been plainly ordered to be returned to the Court. The relation in which he stood when he received it, made it the duty of the Court to see that Hyman did not lose his money, or that the infants, whose lands were sold, should have it.

That his office of commissioner had terminated could make no difference in the duty of the Court. In the case of *Bagley* vs. *Yates and Prentiss*, where a deputy marshal had received money due upon a judgment after he had returned the execution, the Court issued an attachment against him for not paying it over; 3 McLean's Rep. 465. But in that case it could not have been said that he received the money strictly as a deputy marshal; his principal would not have been liable; yet he stood in such a relation to the Court when he received it, that it was the duty of the judge to see

that he did not degrade the justice of the Court, whose minister he was.

5. But it is said the Court had no authority to sell the estate of infants; and therefore the whole proceeding was *coram non judice*, and void. I think the Court had the power. But whether it had the power to order a sale of the estate or not, the party stood in the same relation to the Court, as to this note and this sum of money; just as much under its supervision in the one instance as the other. And, if it were found out that the Court could not decree a good title to Hyman, it at once became, on that account, the duty of the Court to order back to him his money.

6. It is contended that Chap. 51 of the Revised Statutes, concerning insolvent debtors, authorized the justices of the peace to discharge the party from the jail. The 5th section says: "The provisions of this chapter shall apply to a person imprisoned by order of a Court of Chancery, to compel the payment of money under a decree or judgment of such Court." I do not think the statute applies even to such part of the order as has a reference to the non-payment of the money. It is not a commitment until he pay the money; but it is for the contempt in not having paid it, and "'till the further order of the Court." But, be this as it may, the act only applies to cases of a "decree or judgment." It could not have been intended to apply to cases where *orders*, not *decrees*, are made against the officers of a Court for abusing their authority, and failing to comply with the orders of the Court to restore the abuse. The distinction between decrees to pay money, and such orders, is well understood. The Court orders its receiver, its commissioner or its marshal, to pay money into Court. On this no execution issues; but the Court enforces compliance summarily, and keeps charge of the subject 'till it is ended; and if it should become necessary for the honor of the country's justice, to commit one of these officers, the two justices of the peace have nothing to do with the matter. It would be preposterous if they had. The *decree* is generally for the payment of money, on this an execution issues, as a matter of course; and it is not necessary to comply with the decree, that the money should be brought *into Court*. The

decree is always in favor of some person by name; and it is made in conformity to pleadings, such as bills, answers, cross-bills, petitions; the *order* is not frequently so, and may not be directed at all by them. It is frequently made to pay money into Court, when it is not yet known what party is to have it. The Revised Statutes, page 317, require a copy of the schedule of the insolvent's property he intends to surrender, to be furnished the plaintiff, or his attorney, ten days before he is allowed to take the oath. Now, in many cases, on an order to pay money in, it could not be known who should have notice; but in cases of decrees it is always known. It is true, the word "decree" is in the order in this instance, but that does not change the import. The money was to be paid *into Court*. Besides, this word is only in the last order, on which the party was not in custody for violation.

The order, distinct from the decree, is under the control of the Court, from day to day, and from term to term, and may be revoked or modified, as justice may demand; and, for this reason, it cannot be, that one committed under it can be discharged by the justices. This would frustrate the necessary power of the Court. A decree, such as spoken of in the statute, is final, and cannot be modified at a subsequent term.

7. It is contended that the order of commitment is void, because it is "until further order of the Court."

If the order transcends the power of the Court, in such an instance as this, it will be void, and the party must be discharged; for it is not like other commitments for want of bail, &c., where, if it appear that the party ought to be detained, he will not be absolutely discharged for a defect in the *mittimus*.

The power to imprison for contempts is derived merely and absolutely from the necessity of the case, no further punishment, therefore, can be lawfully inflicted than is necessary in the strictest sense; and if discretion must be given in this country, it must likewise be with-held where it is not impracticable to do so. It may have been the English practice to commit for contempts until further order. The statute of Westm. 2, 13 Edw. 1, provided that persons who resisted the process of the King's Courts or the Sheriff,

should be summarily imprisoned during the King's pleasure. All the commitments for contempt made by the House of Commons, have been, as far as I have seen, during the pleasure of the House. But because these kinds of commitments might be made in England, and might even consort with the genius of the old common law, I do not think they have been adopted by, or consort with, our free institutions, where no power exists but for the public good, and no one's pleasure is to be consulted or regarded. On such subjects we cannot, with safety, turn to the usage of the English Courts, or to the acts of Parliament, centuries ago, nor up to the time of our separation from that Empire. When we adopted the common law, it cannot be said that we adopted all the power exercised under it; nor did we engage society to stand still; but we have left much of its harshness far behind us. Indeed, our enlarged and advancing public sentiment has gone far beyond what is still left standing on our statute books as a memento of the rudeness of former days. If we open the old statutes of Kentucky, we shall find the ducking stool and the pillory; and we will find the abominable practice of the common law formally enacted by the statute of 1796, (and *forgotten* to be repealed by our Revisors,) that condemned a man to be executed for standing mute on his arraigment, or challenging a number of jurors beyond what the law allowed! 1 Morehead and Brown, 528. These barbarisms we trust are repealed by the new Constitution, as it has repeated the words of the old since they were enacted. They have been abrogated and forgotten in the march of society. They certainly would be "cruel and unusual." Yet I am old enough to have seen a pillory standing in the midst of a village, now one of the most refined towns in the State.

Contempt at the common law was likewise punished by the pillory; for with the Courts of England, the mode was measurably one of practice; with us it is a matter of law founded on American principles for the action of the Government on its citizens. Surely we have passed by that mode of punishment without a statute, because it is not *necessary*, and it is cruel in this age.

But I have not sufficient evidence that commitments during the pleasure of the Court, or until further order of the Court, would

have been good in England. What had been deferred to the King might not, if examined, have been deferred to the Courts. Precedents might frequently have been made by letting things pass without examination. Much of this may be inferred from what Mr. Justice Powys said in the case of *Regina* vs. *Paty*, 2 Lord Raym. 1108, "*If all commitments for contempts, even those by this Court,*" (the Queen's Bench,) "*should come to be scanned, they would not hold water.*" In a late case of a commitment for a contempt, the King's Bench discharged the party because the time was not fixed in the *mittimus*, 5 Barnw. and Ald. Rep. 394, *The King* vs. *James*.

A commitment during the pleasure of the House of Commons was deemed good. But the Courts held that it was not indefinite, but that the imprisonment must terminate with the adjournment of the House; and this is strictly true as to the termination of any commitment by a parliamentary body, as decided by the Supreme Court of the United States in the case of *Anderson* vs. *Dunn*, 6 Wheat. 204. The power of the House of Commons to commit for contempt, is stated by *De Grey* in the Lord Mayor's case, to be "*legal, because necessary.*"

Is it necessary that the Courts in this country should have power to commit until further order of the Court? I cannot find it. I can see no call for it. I can see danger in it; and the law should not make danger, where there is no necessity. A freeman should never, by the laws of freemen, be placed in such dreary uncertainty of imprisonment as that when he inquires of the "law of the land," it cannot tell him when it shall end.

No absolute power lives in this country. It cannot exist in a republic. See 2d section of the Bill of Rights.

Suppose the Court should adjourn without having made any further order, the consideration of his case is cut off at once and entirely until the next term. So he must be left without any authority of the judiciary even to meditate his case. And a person committed for contempt cannot be bailed.

The time should be fixed as to its maximum. Then the punishment is duly weighed at once. Then, too, the Executive may see

whether it may be proper to interpose his extraordinary power; a power scarcely ever exercised in America in cases of contempt, because of the leniency of our Courts; and because the governors have deemed the pardoning of contempts an interference with the necessary power of the judiciary.

When the time is fixed, beyond which the Court will not go, then the addition to the order, "or until the further order of the Court," would keep the whole matter in charge of the Court, so that on proper terms, the party might be released before the time arrived. So when there is a commitment for the purpose of enforcing the payment of money, or the delivery of property, the Court should provide in the order, that the party be discharged on giving surety for the money in some form, when he has not got it; and on paying the price of the property, if it shall turn out that the party cannot deliver it; and so of other cases, in order that nothing shall be inflicted but of necessity. This course corresponds with the case of *Patton* vs. *The Commonwealth.*

I know it was decided in 1810, by the Supreme Court of New York, that a commitment until further order of the Court, was valid. This case was reversed by the Senate, whether on this ground or not, I do not know; nor do I regard the opinion of the Senate, except for its argument. 4 Johns. Rep. 318, *The case of Yates;* 6 Johns. Rep. 337, *same case on Error.* In the syllabus made by the reporter to the case of *Yates* vs. *Lansing*, 9 Johns. Rep. 395, it is said, that what was decided by the Supreme Court in the first case, was affirmed in this; but this is not authorized by what was decided in the case, and the syllabus is wrong.

The judgment of the Supreme Court in New York is certainly a precedent that any of us, at first thought, might follow. But I do not think its doctrine can be derived from our institutions, nor do I think we can venture to transplant such from beyond the water; we cannot even say it was the common law. I know it would be a safe power in the hands of the enlightened and benevolent judge who made the order in question here; but my view of the law compels me to decide that the commitment was not valid.

Logan and *T. F. Marshall*, for the Petition.

Fry, against it.